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THE SADDEST SHOW ON EARTH:
THE ENDANGERED SPECIES ACT AS APPLIED TO
CAPTIVE, ENDANGERED MAMMALS IN *PEOPLE FOR THE
ETHICAL TREATMENT OF ANIMALS, INC. V.
MIAMI SEAQUARIUM*

I. WELCOME TO THE CIRCUS: INTRODUCTION

The Endangered Species Act of 1973 (ESA) is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”¹ The ESA is interpreted broadly as “provid[ing] a means whereby the ecosystems upon which endangered species . . . depend may be conserved.”² Under the ESA, it is unlawful to “take any [endangered] species within the United States or the territorial sea of the United States.”³ The ESA defines “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect”⁴

In *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium (Miami Seaquarium)*,⁵ the Eleventh Circuit answered the question: what degree of harm or harassment to a captive, endangered animal is actionable under the ESA?⁶ Disregarding Supreme Court precedent, the Eleventh Circuit’s *per curiam* opinion held that “harm or harassment is only actionable if it poses a threat of serious harm” (serious threat standard).⁷ This heightened standard enabled the court to affirm the United States District Court for the Southern District of Florida’s grant of summary judgment to the Miami Seaquarium (Seaquarium), which kept a highly social and intelligent marine mammal captive in harmful conditions.⁸ No

1. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) (discussing ESA’s breadth of coverage).

2. *Babbitt v. Sweet Home Chapter of Comtys. for a Great Or., ET AL.*, 515 U.S. 687, 698 (1995) (quoting Endangered Species Act of 1973, 16 U.S.C. § 1531(b)(2018)) (explaining Senate’s intent for “take” to be broadly interpreted).

3. Endangered Species Act of 1973, 16 U.S.C. § 1538(a)(1)(B) (2018) (listing unlawful acts under ESA).

4. Endangered Species Act of 1973, 16 U.S.C. § 1532(19) (2018) (defining “take” as it pertains to prohibited ESA actions).

5. 879 F.3d 1142 (11th Cir. 2018) (holding captive killer whale neither harmed nor harassed by conditions of her captivity).

6. *Id.* at 1146 (addressing question of statutory construction).

7. *Id.* at 1150 (noting expansive reading of “take” not appropriate). See *Sweet Home*, 515 U.S. at 702 (explaining use of *noscitur a sociis* not appropriate to ascertain meaning of “take”).

8. *Id.* (affirming lower court ruling).

other court considering the meaning of “take” in the ESA has ever imposed the serious threat standard like the Eleventh Circuit in *Miami Seaquarium*.⁹

This Note discusses the Eleventh Circuit’s holding in *Miami Seaquarium* in light of the factual record of the case and other holdings in cases using the same ESA provision.¹⁰ This Note argues that the Eleventh Circuit erred in adding the serious threat standard to the ESA’s taking provision.¹¹ Further, even if the Eleventh Circuit did not err by adding the serious threat standard, the harm and harassment of the animal in question meets the court’s heightened scrutiny.¹²

Part II of this Note provides a factual background of *Miami Seaquarium* and delineates the parties’ arguments.¹³ Part III discusses the ESA’s taking provision, its jurisprudence, and relevant case law interpreting complementary statutes.¹⁴ Parts IV and V respectively outline the reasoning behind the Eleventh Circuit’s *per curiam* opinion and discuss why the court erred in its ruling.¹⁵ Finally, Part VI predicts the impact that *Miami Seaquarium* will have on the ESA’s jurisprudence in general, as well as its application to captive animals.¹⁶

II. IMMORAL ENTERTAINMENT: FACTUAL AND PROCEDURAL BACKGROUND

Lolita, a Southern Resident killer whale (SRKW), was captured and separated from her familial pod on August 8, 1970 off the coast

9. See *Kuehl v. Sellner*, 887 F.3d 845 (8th Cir. 2018) (ruling Iowa zoo harmed and harassed lemurs without imposing serious threat standard); *Graham v. San Antonio Zoological Soc’y*, 261 F.Supp.3d 711 (W.D. Tex. 2017) (holding elephants were harmed without adding qualifier and while complying with Animal Welfare Act).

10. See *Kuehl*, 887 F.3d at 854 (demonstrating other courts have not imposed heightened standard of harm and harassment).

11. For a discussion of Eleventh Circuit’s legal errors, see *infra* notes 159-92 and accompanying text.

12. For a discussion of Eleventh Circuit’s factual errors, see *infra* notes 195-247 and accompanying text.

13. For a discussion of the facts of Lolita’s confinement, see *infra* notes 17-61 and accompanying text.

14. For a discussion of background law relevant to this issue, see *infra* notes 64-126 and accompanying text.

15. For a discussion of the Eleventh Circuit’s reasoning and its errors, see *infra* notes 127-54 and accompanying text.

16. For a discussion of the impact this case will have on captive sea mammals, see *infra* notes 248-72 and accompanying text.

of Seattle, Washington when she was just three years old.¹⁷ Shortly after her capture, Lolita was sold to Seaquarium in Miami for \$20,000 where she has lived in a small pool ever since.¹⁸ She is the most famous killer whale currently in captivity.¹⁹

When Lolita first arrived at Seaquarium, she shared a tank with Hugo, another SRKW from the same region and potentially a member of her familial pod.²⁰ Hugo had a self-destructive habit of “slamming his head against the sides of the tank and breaking his rostrum.”²¹ This self-harming behavior is extraordinarily atypical in wild killer whales and is likely due to being held in captivity.²² In 1980, after ten years of companionship with Lolita, Hugo rammed his head against the tank, causing a brain aneurysm that led to his death.²³ Lolita has been without the company of another killer whale since Hugo died.²⁴

In an attempt to alleviate her loneliness, Seaquarium housed two Pacific white-sided dolphins (PWSDs) with Lolita.²⁵ The PWSDs often harass Lolita with inappropriate sexual or violent behavior.²⁶ In 2015 alone, the PWSDs “raked her skin over [fifty] times.”²⁷ Raking is a show of aggression whereby dominant whales and dolphins scrape the fragile skin of less dominant animals with

17. *Lolita's Capture*, ORCA NETWORK, http://www.orcanetwork.org/Main/index.php?categories_file=Lolitas+Capture (last visited Oct. 12, 2020) (detailing Lolita's capture from Washington).

18. Christina Colvin, *Lolita: Fame and Misfortune*, WHALE SANCTUARY PROJECT, <https://whalesanctuaryproject.org/whales/lolita-fame-misfortune/> (last visited Jan. 21, 2021) (detailing Seaquarium's acquisition of Lolita).

19. *Id.* (noting that Lolita is most famous killer whale in captivity).

20. *Id.* (discussing Lolita's tank companion, Hugo).

21. *Id.* (noting Hugo's violent behavior). A rostrum is the snout of a whale. *Killer Whale Anatomy*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://oceanoday.noaa.gov/killerwhaleanatomy/> (last visited Oct. 15, 2020) (defining rostrum).

22. Colvin, *supra* note 18 (describing Hugo's tendency to self-harm). Self-harm is an example of stereotypic behavior, which is behavior common in captive animals but not their wild counterparts. Joseph Garner, *Stereotypies and Other Abnormal Repetitive Behaviors: Potential Impact on Validity, Reliability, and Replicability of Scientific Outcomes*, 46 INST. FOR LAB. ANIMAL RSCH. J. 106, 106 (2005) (defining stereotypic behavior). Animals exhibiting stereotypic behavior are often under extreme stress. *Id.* (explaining why animals behave this way).

23. Colvin, *supra* note 18 (noting Hugo's tragic death was akin to suicide).

24. *Id.* (observing Lolita's profound loneliness without company of another whale).

25. *Id.* (outlining steps taken by Seaquarium to help Lolita following Hugo's death).

26. *Id.* (describing Lolita's sexual harassment).

27. *Id.* (explaining extent of PWSDs' raking).

their teeth.²⁸ Resultingly, Lolita often has “open, bleeding wounds” on her body.²⁹ When issues arise between the species, neither the PWSDs nor Lolita can escape due to the size of the tank.³⁰ Several experts in the field have stated that different cetacean species being housed together show elevated levels of aggression.³¹

Lolita currently measures around twenty-one feet long and weighs over seven thousand pounds.³² Despite her immense size, Lolita’s tank “is the size of a hotel swimming pool.”³³ Wild killer whales can swim hundreds of miles per day and dive up to five hundred feet in a single attempt.³⁴ Lolita does not have any comparable opportunity.³⁵ She swims slowly in circles, stuck in the smallest killer whale tank in the world.³⁶ At its longest dimension, the tank is “just four times the length of her body.”³⁷ The depth of the tank ranges from twelve to twenty feet.³⁸ According to Seaquarium’s own records, the water level is often dropped, and Lolita was once left with a “maximum depth of only eleven feet.”³⁹ The Seaquarium’s conditions stand in stark contrast to the open oceans, where killer whales can freely swim and dive.⁴⁰

Because of the cramped conditions, Lolita often exhibits signs of distress and frustration — commonly recognized as “precursors

28. Heather Rally, *Exposed: A Veterinarian Visits SeaWorld*, SEAWORLD OF HURT (Oct. 21, 2014), <https://www.seaworldofhurt.com/features/veterinarian-visits-seaworld/> (defining raking).

29. Colvin, *supra* note 18 (explaining consequences of PWSDs’ violence towards Lolita).

30. *Id.* (explaining neither Lolita nor PWSDs can escape each other).

31. See Rally, *supra* note 27 (describing harmful effects of different species cohabitating).

32. *Her Tank*, SAVE LOLITA, <https://www.savelolita.org/> (last visited Sept. 7, 2020) (describing Lolita’s current size).

33. *Her Story*, SAVE LOLITA, <https://www.savelolita.org/> (last visited Sept. 7, 2020) (highlighting unsuitable size of Lolita’s tank).

34. *Id.* (explaining normal behavioral patterns).

35. *Id.* (noting Lolita cannot swim like wild counterparts).

36. *Id.* (explaining inability of Lolita’s tank to accommodate killer whale swimming patterns). In all practicality, Lolita’s tank is eighty feet wide by thirty-five-feet long due to the “work island” stuck in the middle of her tank. *Her Tank*, *supra* note 32 (detailing impediments in tank). This is in violation of federal guidelines for the size of a killer whale’s tank. Space Requirements, 9 C.F.R. § 3.104 (2000) (giving space requirements for housing marine mammals).

37. *12 Things Lolita Would Want Miami Seaquarium Visitors to Know*, PETA, <https://www.peta.org/features/lolita-miami-seaquarium-know/> (last visited Oct. 18, 2020) (comparing her tank size to her body size).

38. *Id.* (detailing depth of her tank).

39. *Id.* (explaining how her tank is often too shallow).

40. See *id.* (contrasting wild killer whale behavioral patterns with size of Lolita’s tank).

to aggressive behavior.”⁴¹ Seaquarium’s behavioral records for Lolita show many well-known signs of distress: “head-bobbing, a tense body, an open mouth, slapping with her flukes or pectoral fins, jaw-popping, wide-open eyes, ignoring signals, unusual vocalizations, avoidance, sinking under the surface, and deliberate slow movements.”⁴² These behaviors are all signs of “zoochosis,” which is a form of animal psychosis caused by the stress and abnormality of confinement.⁴³

In 2017, as category-five Hurricane Irma raged the Miami coast, Seaquarium officials abandoned Lolita and left her to die in her tank.⁴⁴ This abandonment made Lolita vulnerable to any number of fatal injuries.⁴⁵ For example, Seaquarium’s stadium could have collapsed around her, leaving her trapped or crushed beneath debris.⁴⁶ The storm could have also “undermined the glass of her pool, causing it to shatter and injure” Lolita.⁴⁷ Out of sheer luck, Lolita managed to survive the ordeal and continues to perform, for paying audiences, in Miami to this day.⁴⁸

Like her namesake, Lolita is the subject of depraved attraction.⁴⁹ Before the COVID-19 pandemic halted Seaquarium’s operations, they employed Lolita to perform stunts for park visitors every

41. *Id.* (noting Lolita’s behavior borders on aggression).

42. *12 Things Lolita Would Want Miami Seaquarium Visitors to Know*, *supra* note 37 (detailing Lolita’s abnormal behavior).

43. Laura Smith, *Zoos Drive Animals Crazy*, SLATE (June 20, 2014), <https://slate.com/technology/2014/06/animal-madness-zoochosis-stereotypic-behavior-and-problems-with-zoos.html> (defining zoochosis). Zoochosis is a broad term used to describe animal behavioral patterns that would never occur in the wild. *Id.* (detailing symptoms of zoochosis). Examples of these behaviors include pacing, trichotillomania, figure-eight swimming, and self-harm. *Id.* (giving examples of zoochotic behavior). These atypical behaviors are coping mechanisms for the unstimulating and small environments of captive animals. *Id.* (stating why animals act differently in captivity).

44. Colvin, *supra* note 18 (discussing how Seaquarium abandoned Lolita during catastrophe without regard for her safety).

45. Isabella Vi Gomes, *Lolita, Miami Seaquarium’s Orca, Left in Tank During Hurricane Irma*, *Activists Say*, MIAMI NEW TIMES (Sept. 13, 2017), <https://www.miaminewtimes.com/news/orca-lolita-left-outside-during-irma-9665020> (describing Lolita’s peril).

Former SeaWorld trainer Dr. Jeffrey Ventre stated that she was left vulnerable to missile injury from flying debris, blunt force trauma, extreme stress, PTSD, and exposure to contaminated floodwater. *Id.* (noting some risks Lolita faced).

46. *Id.* (highlighting worst-case-scenario).

47. *Id.* (describing another way Lolita may have died).

48. *Id.* (suggesting Lolita is lucky to be alive).

49. See Vladimir Nabokov, *LOLITA* 270 (N.Y.: Vintage Int’l, 2d ed. 1997) (1955) (describing character of Lolita).

day, twice per day, for fifty years.⁵⁰ The performance subjected Lolita to many unnatural behaviors and forced her to act like a circus animal.⁵¹ During shows, trainers stand on her, pose on top of her, and ride on her back like a horse.⁵² Despite Lolita's declining health and zoochotic behavior, Seaquarium continues to "put on show after show with its money-making star."⁵³ For Seaquarium, the show must always go on, even when Lolita is unable "to keep her eyes open or had recently undergone invasive procedures."⁵⁴

In 2013, People for the Ethical Treatment of Animals, Inc. (PETA) commenced the present action seeking forfeiture of Lolita, so she could spend the rest her days in a seapen.⁵⁵ PETA claimed Seaquarium committed an unlawful "take" in violation of the ESA, because "Lolita [was] suffering 'harm' and 'harassment'. . . from the conditions under which she is confined."⁵⁶ In its complaint, PETA cited thirteen injuries to Lolita to show Seaquarium harmed and harassed her:

- (1) Physical and psychological injury caused by Lolita's inability to engage in normal swimming and diving behaviors in her tank; (2) Psychological injury attributable to the absence of a socially compatible companion; (3) Rakes inflicted when the PWSDs scrape Lolita with their teeth while swimming past her; (4) Stress caused by the PWSDs' aggressive behavior; (5) Stress caused by the PSWDs' inap-

50. Andrew Buncombe, 'We're Coming to liberate Her': The fight to free killer whale held captive for 50 years, INDEP. (June 22, 2019), <https://www.independent.co.uk/news/world/americas/killer-whale-lolita-captivity-orca-miami-seaquarium-lumination-a8961486.html> (explaining Lolita's performance schedule).

51. Kim Johnson, *The Loneliest Whale Ever*, PETA2 (Aug. 8, 2018), <https://www.peta2.com/news/whale-lolita-miami-seaquarium/> (describing Lolita's performances).

52. *Id.* (showing pictures of Seaquarium trainers standing on/riding Lolita).

53. *12 Things Lolita Would Want Miami Seaquarium Visitors to Know*, *supra* note 37 (suggesting Seaquarium cares more about money than Lolita).

54. *Id.* (explaining Seaquarium forced Lolita to perform even if ill).

55. *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 189 F.Supp.3d 1327, 1335 (S.D. Fla. 2016) (explaining relief PETA sought). A seapen is an oceanic enclosure where whales who have spent extended time in captivity can be reintroduced to life in the open ocean. *See* Amorina Kingdon, *Luxury Living for Retired Whales*, HAKAI MAG. (Mar. 2, 2017), <https://www.hakaimagazine.com/news/luxury-living-retired-whales/> (describing nature and purpose of seapens). While not as ideal as life in the open ocean, seapens are significantly larger than Lolita's current housing and would allow her to be in her native waters. *Id.* (highlighting that seapen is best of bad situation). Unfortunately, whales accustomed to captivity cannot suddenly cope with freedom and may react "the same way as humans getting out of prison after long sentences." *Id.* (explaining why whales cannot be freed to open waters).

56. *Id.* (detailing specific kind of "take" PETA alleged).

appropriate sexual behavior; (6) “Surfer’s eye,” a condition caused by exposure to UV radiation for which Lolita requires twice-daily eye drops; (7) Blisters and wrinkles potentially caused by sun exposure; (8) Treatment with antibiotics, antifungals, pain medication, hormones, and antacids not used on wild [killer whale]; (9) General unhealthiness illustrated by: a mild kidney impairment, a high number of bacteria, past treatment for respiratory infections, and a potential recurring lung condition; (10) Abnormal behavior like listless floating, lying motionless near her tank’s inflow valve, pattern swimming, etc.; (11) Significant wear in six teeth; (12) A tooth that has been drilled multiple times; and (13) Captivity conditions likely to reduce Lolita’s lifespan.⁵⁷

Seaquarium subsequently filed a Motion for Summary Judgment, and the United States District Court for the Southern District of Florida granted the motion on June 1, 2016.⁵⁸ The court interpreted the terms “harm” and “harass” to mean conduct that is gravely threatening to the life of a protected species.⁵⁹ The court, consequently, held that the conditions of Lolita’s confinement did not rise to the level of gravely threatening her existence.⁶⁰ PETA appealed to the Eleventh Circuit and alleged that the district court erred when it imposed the “gravely threatening” standard and when it ruled — as a matter of law — that Seaquarium’s conduct was not gravely threatening to Lolita’s safety.⁶¹

III. WALKING THE TIGHTROPE: BACKGROUND

This section provides background information on the statutes and case law that protect animals applied in the Eleventh Circuit’s ruling in *Miami Seaquarium*, which affirmed the district court’s ruling and held that the serious threat standard controls the ESA’s taking provision.⁶² This section also discusses case law regarding

57. *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 879 F.3d 1142, 1150 n.4 (11th Cir. 2018) (listing injuries to Lolita).

58. *People for the Ethical Treatment of Animals, Inc.*, 189 F.Supp.3d at 1355 (explaining PETA’s chosen remedy was with Congress not courts).

59. *Id.* at 1346 (explaining harm or harassment of endangered species is actionable only if conduct is sufficiently threatening).

60. *Id.* at 1355 (concluding no evidence Lolita’s existence was gravely threatened).

61. *People for the Ethical Treatment of Animals, Inc.*, 879 F.3d at 1146 (noting PETA’s reasons for appeal).

62. For a discussion of animal protection law, see *infra* notes 66-114 and accompanying text.

how courts should reconcile the ESA and the Animal Welfare Act (AWA), which are complementary statutes.⁶³ As a whole, animal protection law is intended to be broadly construed for its purpose: conservation.⁶⁴ While most courts uphold this expectation, the Eleventh Circuit inexplicably departed from established precedent in *Miami Seaquarium*.⁶⁵

A. Animal Protection Statutes

Animal conservation in the United States began in 1903 when President Theodore Roosevelt established “the first National Wildlife Refuge at Pelican Island, Florida” to protect endangered water birds.⁶⁶ In 1918, the United States passed its first piece of conservation legislation: the Migratory Bird Treaty Act.⁶⁷ This Act formally implemented an international conservation treaty that the United States entered into with Canada in 1916.⁶⁸ The Act prohibited the “take (including killing, capturing, selling, trading, and transport) of protected migratory bird species” without governmental authorization.⁶⁹

Congress passed the Endangered Species Preservation Act in 1966.⁷⁰ This first iteration of the ESA provided “a means for listing native animal species as endangered and giving them limited protection.”⁷¹ The Act also called for “an international meeting to adopt a convention to conserve endangered species.”⁷² In 1973, this provision was actualized when eighty nations met in Washington, D.C. to sign the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).⁷³ CITES monitors

63. For a discussion of interpretation of complementary statutes, see *infra* notes 115-26 and accompanying text.

64. See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) (describing breadth of ESA).

65. See *People for the Ethical Treatment of Animals, Inc.*, 879 F.3d at 1150 (departing from Supreme Court precedent).

66. *A History of the Endangered Species Act: Timeline*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/endangered/laws-policies/timeline.html> (last updated Jan. 30, 2020) (outlining history of conservation in America).

67. *Id.* (detailing America’s first conservation statute).

68. *Migratory Bird Treaty Act*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/birds/policies-and-regulations/laws-legislations/migratory-bird-treaty-act.php> (last updated Apr. 16, 2020) (stating history of Act).

69. *Id.* (describing prohibited acts similar to ESA’s).

70. *A History of the Endangered Species Act of 1973*, U.S. FISH & WILDLIFE SERV. (Aug. 2011), https://www.fws.gov/endangered/esa-library/pdf/history_ESA.pdf (detailing passing of first endangered species statute).

71. *Id.* (explaining first iteration of ESA).

72. *Id.* (stating Act required international cooperation).

73. *Id.* (detailing nature of international convention on conservation).

and restricts “international commerce in plant and animal species believed to be harmed by trade.”⁷⁴ Later that same year, Congress passed the ESA.⁷⁵

The ESA is a comprehensive piece of legislation enacted to “provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved [and] to provide a program for the conservation of such endangered species”⁷⁶ Under the ESA, certain actions taken against endangered or threatened species are unlawful.⁷⁷ Among other prohibited acts, “it is unlawful for any person . . . to take any [endangered] species within the United States or the territorial sea of the United States.”⁷⁸ “Take” is further defined within the ESA to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect”⁷⁹ The National Marine Fisheries Service (NMFS), tasked with overseeing marine mammals, defines “take” as “an act which actually kills fish or wildlife.”⁸⁰ SRKWs, like Lolita, are recognized as an endangered species under the ESA and, consequently, are afforded statutory protections.⁸¹

The AWA provides additional standards to “insure that animals intended for . . . exhibition purposes . . . are provided humane care and treatment.”⁸² The AWA mandates licensing for facilities using animals for exhibitions and does not grant licenses unless the “exhibitor . . . ha[s] demonstrated that [its] facilities comply with the [AWA’s] standards.”⁸³ The AWA grants the Secretary of Agriculture the authority to “promulgate standards to govern the humane handling, care, treatment, and transportation of animals by . . . exhibi-

74. *Id.* (highlighting purpose of convention).

75. *A History of the Endangered Species Act of 1973*, *supra* note 70 (explaining origin of modern ESA statute).

76. Endangered Species Act of 1973, 16 U.S.C. § 1531(b)(1988) (reviewing Congress’s purpose for passing statute).

77. 16 U.S.C. § 1538(a)(1)(b) (1988) (outlining actions that cannot be taken against endangered species.)

78. *Id.* (listing prohibited actions under ESA).

79. 16 U.S.C. § 1532(19) (1988) (defining “take” within framework of ESA).

80. Definitions, 50 C.F.R. § 222.102 (2015) (defining the NMFS interpretation of prohibited takes). The definition goes on to say that “such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns” *Id.* (detailing “take” definition).

81. Endangered and Threatened Wildlife, 50 C.F.R. § 17.11 (2020) (listing SRKWs as endangered species).

82. Animal Welfare Act of 1966, 7 U.S.C. § 2131(1) (1976) (stating one of AWA’s purposes).

83. Animal Welfare Act of 1966, 7 U.S.C. § 2133 (2014) (providing overview of licensing procedures).

tors.”⁸⁴ For example, an AWA regulation controls the space requirements for housing marine mammals.⁸⁵ Under this regulation, a tank housing a killer whale roughly twenty-one feet long requires a minimum horizontal dimension of forty-eight feet and a minimum depth of twelve feet.⁸⁶ Both the ESA and the AWA protect Lolita as a captive SRKW.⁸⁷

B. Animal Protection Case Law

The Supreme Court of the United States first addressed the meaning of “harm” within the ESA’s taking provision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.⁸⁸ In *Sweet Home*, the foresting industry challenged a new regulation that redefined the statutory term “harm,” alleging that the Secretary of the Interior “exceeded his authority under the Act by promulgating that regulation.”⁸⁹ The new regulation clarified that harm includes “significant habitat modification or degradation . . . [that] actually kills or injures wildlife.”⁹⁰ The Supreme Court disagreed with the foresters and held that the regulation was reasonable.⁹¹ Crucial to the Court’s holding was a Senate Report emphasizing that “[t]ake’ is defined . . . in the broadest possible manner to include every conceivable way in which a person can ‘take’ . . . any fish or wildlife.”⁹²

Further, the Court held that the appellate court applied *noscitur a sociis* inappropriately to ascertain the meaning of “harm” within the definition of “take.”⁹³ When using *noscitur a sociis*, the term “harm” serves “essentially the same function as other words in

84. Animal Welfare Act of 1966, 7 U.S.C. § 2143(a) (1985) (stating purpose for promulgating standards).

85. 9 C.F.R. § 3.104(b) (2001) (detailing space requirements for marine mammals).

86. *Id.* (providing required tank dimensions for housing large marine mammals).

87. Listing Endangered or Threatened Species: Amendment to the Endangered Species Act Listing of the Southern Resident Killer Whale Distinct Population Segment, 80 Fed. Reg. 7,380, 7,388 (Feb. 10, 2015) (to be codified at 50 C.F.R. pt. 244) (declaring explicitly that ESA protects Lolita).

88. 515 U.S. 687, 704 (1995) (stating Congress intended “take” to apply broadly).

89. *Id.* at 690 (recounting case’s allegations).

90. *Id.* at 691 (detailing new regulatory language).

91. *Id.* at 700 (holding Secretary did not exceed statutory authority).

92. *Id.* at 704 (quoting S. Rep. No. 93-307, at 2995 (1973)) (stating Congress intended ESA to apply broadly).

93. *Sweet Home*, 515 U.S. at 702 (holding lower court applied *noscitur a sociis* incorrectly). *Noscitur a sociis* is a canon of statutory interpretation that determines the meaning of a word in a statute based on the words surrounding it. *Id.* (defining *noscitur a sociis*).

the definition [of take], thereby denying it independent meaning.”⁹⁴ In his dissent, Justice Scalia argued that the use of *noscitur a sociis* is appropriate and held that the majority expanded the meaning of “harm” erroneously.⁹⁵ Justice Scalia reasoned that the word “take” is defined to cover ten prohibited actions that describe intentional conduct.⁹⁶ Thus, the dissent held that “harm” should be read narrowly to cover only intentional acts.⁹⁷

In *Hill v. Coggins*,⁹⁸ zoo visitors brought suit against the zoo’s owners, alleging that the “[z]oo’s conduct is a form of harass[ment] of . . . its bears.”⁹⁹ The Fish and Wildlife Service (FWS) defines “harass” within the taking provision as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns.”¹⁰⁰ This definition does not include “generally accepted animal husbandry practices that meet or exceed the minimum standards for facilities and care under the [AWA].”¹⁰¹ With these definitions in mind, the Fourth Circuit held that to establish harassment, a plaintiff must prove “(1) that the [z]oo’s animal husbandry practices fall within the [FWS’s] definition of harass, and (2) that those practices do not fall within the . . . exclusion from that definition.”¹⁰² The Fourth Circuit issued its decision without adding a qualifier requiring serious or grave harassment.¹⁰³

In *Graham v. San Antonio Zoological Society*,¹⁰⁴ the United States District Court for the Western District of Texas denied a motion for summary judgment on factual grounds on behalf of a zoo housing

94. *Id.* (explaining why lower court applied *noscitur a sociis* inappropriately). In this case, applying *noscitur a sociis* would imply that only acts intending to harm animals are actionable because the words surrounding the word “harm” seem to require intent. *See id.* at 721 (Scalia, J., dissenting) (applying *noscitur a sociis*).

95. *Id.* at 721 (arguing courts should read harm narrowly to cover only acts intended to harm animals).

96. *Id.* at 720 (reasoning statutory construction supports narrow reading of “harm”).

97. *Id.* (holding only intentional harm is actionable).

98. 867 F.3d 499 (4th Cir. 2017) (holding plaintiffs can prove endangered, captive animal harassment through AWA animal husbandry violations).

99. *Id.* at 503 (stating plaintiffs’ allegations).

100. *Id.* at 509 (citing 50 C.F.R. § 17.3 (2006)) (defining FWS’s interpretation of “harass”).

101. *Id.* (emphasis omitted) (explaining exceptions to definition of “harass”).

102. *Id.* at 510 (recounting plaintiff’s requirements for prevailing on remand).

103. *Hill*, 867 F.3d at 511 (holding zoo harassed bears without adding qualifier).

104. 261 F. Supp. 3d 711, 716-17 (W.D. Tex. 2017) (holding factual issue exists as to zoo’s elephant treatment).

an isolated elephant without adequate sun protection.¹⁰⁵ In reaching this ruling, the district court stated plainly that it found the lower court's reasoning in *Miami Seaquarium* largely unpersuasive because the court failed to "cite a source for its 'gravely threatening' standard."¹⁰⁶ The *Graham* court held that it was unnecessary to invoke canons of statutory interpretation because the "FWS has promulgated clear, straightforward definitions of [harm and harass]."¹⁰⁷ The FWS's definitions of harm and harass demonstrate that "the nature of an act that violates the ESA must be more than any minor injury or harm in the literal sense . . . though the language comes far short of requiring a 'grave[] threat.'"¹⁰⁸

Finally, in *Kuehl v. Sellner*,¹⁰⁹ the Eighth Circuit engaged in significant factual analysis and held that zoo owners harmed and harassed lemurs without using the serious threat standard.¹¹⁰ The lemurs in question were living in isolation despite being "extremely social" animals, and the court ruled that keeping these animals in isolation violated the ESA.¹¹¹ Further, the court held that noncompliance with AWA standards "constitute[d] 'harassment' and 'taking' within the meaning of the [ESA]."¹¹² The court found that the zoo harassed the lemurs by inadequately cleaning and maintaining the pen per AWA standards, leading to a "buildup of feces" in the pens.¹¹³ The Eighth Circuit ruled the zoo violated the ESA and ordered the lemurs to be transferred to a different facility, all without adding a heightened standard to the definitions of "harm" and "harass."¹¹⁴

105. *Id.* at 751 (holding whether inadequate sun protection harmed elephant is an issue of material fact).

106. *Id.* at 741-42 (stating why district court refused to follow S.D. of Florida's approach).

107. *Id.* at 743 (noting that *Miami Seaquarium* court erred by applying canons of statutory interpretation when statute provided clear definitions).

108. *Id.* (deciding injury must be more than minor but need not reach grave threat standard).

109. 887 F.3d 845, 853 (8th Cir. 2018) (holding keeping lemurs in filthy, isolated cages constitutes harassment).

110. *Id.* (concluding zoo's containment of lemurs violated ESA).

111. *Id.* at 849 (noting zoo did not tend to lemur's wellbeing).

112. *Id.* at 853 (stating other ways court could find harassment occurred).

113. *Id.* (noting zoo violated 9 C.F.R. § 3.84(a) which requires daily removal of food waste from enclosures).

114. *See Kuehl*, 887 F.3d at 854 (declining to apply gravely threatening standard).

C. Complementary Statutes

In *POM Wonderful LLC v. Coca-Cola Co.*,¹¹⁵ the Supreme Court decided whether the Federal Food, Drug, and Cosmetics Act (FDCA) precluded a private party from bringing a Lanham Act claim to challenge a misleading food label that would normally be regulated under the FDCA.¹¹⁶ The Lanham Act is a federal trademark statute that authorizes private causes of action for prohibited activities like unfair competition and false advertising.¹¹⁷ The FDCA, on the other hand, authorizes the Food and Drug Administration (FDA) to oversee and regulate the safety of food, drugs, and cosmetics.¹¹⁸ POM Wonderful, a pomegranate juice manufacturer, sued Coca-Cola under the Lanham Act for advertising a pomegranate blueberry juice that contained only 0.3% pomegranate juice and 0.2% blueberry juice.¹¹⁹

In its defense, Coca-Cola argued that its compliance with the FDCA, a more specific statute, precluded liability under the Lanham Act, a more general statute.¹²⁰ The best way to reconcile these laws, Coca-Cola argued, is to hold that “the more specific provisions of the FDCA bar certain causes of action authorized . . . by the Lanham Act.”¹²¹ Coca-Cola reasoned that if the FDA did not identify a problem with their packaging, POM Wonderful could not bring a private suit under the more general Lanham Act.¹²²

The Court rejected Coca-Cola’s argument and held that “neither the Lanham Act nor the FDCA, in express terms, forbids or limits Lanham Act claims.”¹²³ If Congress had intended one statutory scheme to preclude the other, it should have explicitly said so.¹²⁴ Importantly, the Court noted that the statutes served different functions and provided different remedies.¹²⁵ Thus, the Su-

115. 573 U.S. 102 (2014) (holding complementary statutes should not be read as mutually exclusive).

116. *Id.* at 106 (stating issue Court heard).

117. Nicholas A. Fromherz & Brett W. Sommermeyer, *The Endangered Species Act as Applied to Captive Animals: Sea Shepherd Legal’s Amicus Brief in Peta v. Miami Seaquarium*, 24 ANIMAL L. 277, 284 (2018) (detailing Lanham Act).

118. *Laws Enforced by FDA*, FOOD AND DRUG ADMIN., <https://www.fda.gov/regulatory-information/laws-enforced-fda> (last updated Mar. 29, 2018) (describing FDCA).

119. *POM Wonderful LLC*, 573 U.S. at 105 (giving facts of case).

120. *Id.* at 112 (stating Coca-Cola’s defense).

121. *Id.* (detailing Coca-Cola’s preferred reconciliation).

122. Fromherz ET AL., *supra* note 117 (explaining Coca-Cola’s argument).

123. *POM Wonderful LLC*, 573 U.S. at 113 (rejecting Coca-Cola’s interpretation).

124. *Id.* (declining to deviate from Congress’s intent).

125. *Id.* at 115 (noting statutes have different functions).

preme Court ruled that “when two statutes complement each other, it would show disregard for the congressional design to hold that Congress . . . intended one federal statute to preclude the operation of the other.”¹²⁶

IV. THE TIGHTROPE COLLAPSES: NARRATIVE ANALYSIS

In a *per curiam* opinion, the Eleventh Circuit affirmed the Southern District of Florida’s ruling that Lolita was neither harmed nor harassed within the purview of the ESA.¹²⁷ To begin its analysis, the court looked to the words of the statute and noted that neither “harmed” nor “harassed” were defined within the ESA.¹²⁸ Lacking a statutory definition, the court turned to common usage and defined the words using a dictionary.¹²⁹ With the dictionary definitions in mind, the court concluded there was not a “plain and unambiguous meaning” of “harm” and “harass.”¹³⁰

The court then employed *noscitur a sociis* to determine when an action harms or harasses an animal in violation of the ESA.¹³¹ In doing so, the court utilized the dissent’s approach in *Sweet Home*.¹³² Applying this maxim, the court emphasized that harm and harassment are actionable only if the animal faces a threat of serious harm.¹³³ The court explained this heightened standard is appropriate due to the terms “harm” and “harass” being surrounded by terms describing conduct that poses a threat of serious harm.¹³⁴ In reaching the serious threat standard, the Eleventh Circuit rejected PETA’s argument that *noscitur a sociis* was inappropriate given the

126. *Id.* (ruling Congress intended these statutes to complement — not work against — one another).

127. *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 879 F.3d 1142, 1144 (11th Cir. 2018) (affirming lower court grant of summary judgment).

128. *Id.* at 1146 (stating starting point of court’s analysis).

129. *Id.* (defining harm and harass with dictionary). Harm means “to cause hurt or damage to; injure.” Harass is defined as “to vex, trouble, or annoy continually or chronically.” *Id.* (defining terms using dictionary).

130. *Id.* (explaining why court turns to canons of statutory construction).

131. *Id.* at 1147 (ascertaining meaning of “take”).

132. *People for the Ethical Treatment of Animals, Inc.*, 879 F.3d at 1147 (using dissent’s reasoning over majority’s). *Noscitur a sociis* is an interpretive maxim that counsels “a word is known by the company it keeps.” *Id.* (defining maxim).

133. *Id.* (holding harm and harassment must pose grave threat to animal life before they are actionable).

134. *Id.* (explaining rationale for heightened standard). The terms in the statutory definition are as follows: harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect. 16 U.S.C. § 1532(19) (2018) (defining “take” within ESA).

Sweet Home ruling.¹³⁵ Instead, the court held that the canon does not “deprive ‘harm’ and ‘harass’ of independent meaning.”¹³⁶ Despite acknowledging the broad purposes of the ESA, the court decided “harm” and “harass” must be read as “referring to conduct that poses a threat of serious harm.”¹³⁷

Moreover, the court denied that the broad purposes of the ESA compelled a finding for PETA.¹³⁸ When distinguishing the present case, the court explained that the claim in *Sweet Home* challenged a regulation “covering indirect action” within the meaning of “harm.”¹³⁹ The Eleventh Circuit noted that if the *Sweet Home* Court ruled indirect action is not harm, that ruling would have “cause[d] the precise harms that Congress enacted the [ESA] to avoid.”¹⁴⁰ Although the court did not explain why, the Eleventh Circuit reasoned that interpreting “harm” and “harass” to mean any conduct that falls within the dictionary definitions of these terms would be “out of step with [the] ESA’s purpose.”¹⁴¹

The court continued by suggesting regulatory interpretations support its proffered definitions for “harm” and “harass.”¹⁴² To support its contention, the court noted that NMFS defines “harm” as an act that “actually kills or injures fish or wildlife.”¹⁴³ Because “injure” is juxtaposed with “actually kill,” the Eleventh Circuit concluded the NMFS intended its definition to require a serious threat.¹⁴⁴ Noting that the NMFS did not define “harass,” the court turned to the FWS’s definition.¹⁴⁵ The FWS does not, however, reg-

135. *People for the Ethical Treatment of Animals, Inc.*, 879 F.3d at 1148 (rejecting PETA’s argument that *noscitur a sociis* is inappropriate).

136. *Id.* (suggesting “harm” reaches injury inflicted by means not listed and “harass” reaches vexatious conduct not covered by other terms in “take”).

137. *Id.* (announcing “harm” and “harass” definition).

138. *Id.* (acknowledging broad purposes but not interpreting “harm” and “harass” broadly).

139. *Id.* (attempting to distinguish *Sweet Home*).

140. *People for the Ethical Treatment of Animals, Inc.*, 879 F.3d at 1148-49 (explaining broad interpretation was necessary in *Sweet Home* but not in this instance).

141. *Id.* at 1149 (failing to explain why broad interpretation of “harm” and “harass” is inconsistent with ESA).

142. *Id.* (suggesting agency interpretations support their definitions).

143. 50 C.F.R. § 222.102 (2015) (defining “harm”). NMFS gives “significant habitat modification . . . which actually kills or injures [wildlife] by significantly impairing essential behavioral patterns” as an example. *Id.*

144. *People for the Ethical Treatment of Animals, Inc.*, 879 F.3d at 1149 (explaining how NMFS supports their standard). The court further reasoned that the use of the word “significant” supports their serious threat standard. *Id.* (justifying serious threat standard).

145. *Id.* (borrowing another agency’s definition).

ulate marine mammals.¹⁴⁶ The FWS's definition for "harass" is an "intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns."¹⁴⁷ Because the FWS used the word "significant" to describe the disruption to behavioral patterns, the court interpreted FWS's definition of "harass" only to cover acts creating a "likelihood of a sufficiently serious threat."¹⁴⁸

Finally, the court reasoned that the relationship between the ESA and the AWA supports the proffered definitions of "harm" and "harass."¹⁴⁹ The AWA's complex regulatory scheme supports this decision, as it ensures the humane treatment of captive animals.¹⁵⁰ The court explained that PETA's definitions of "harm" and "harass" would "sweep so broadly as to deprive AWA compliance of practical significance."¹⁵¹ Even if the AWA approved particular captivity practices, the court worried exhibitors could incur ESA liability if plaintiffs "fram[ed confinement conditions] as an impermissible 'take,' no matter how *de minimis* the harm it caused."¹⁵² Ultimately, the Eleventh Circuit held that "'harm' or 'harassment' is actionable if it poses a threat of serious harm."¹⁵³ The court suggested this definition "provides captive endangered animals with an additional layer of protection from harmful conditions of captivity without abrogating the [AWA's] complex regulatory scheme."¹⁵⁴

V. THE KILLER WHALE IN THE ROOM: CRITICAL ANALYSIS

This Section will argue that the Eleventh Circuit's holding that Lolita was neither harmed nor harassed within the purview of the

146. *Id.* (noting FWS regulates terrestrial animals).

147. Definitions, 50 C.F.R. § 17.3 (2006) (defining "harass"). Regulation gives breeding, feeding, and sheltering as examples of behavioral patterns. *Id.* (providing examples of behavioral patterns).

148. *People for the Ethical Treatment of Animals, Inc.*, 879 F.3d at 1149 (reasoning *de minimis* harassment does not significantly disrupt normal behavioral patterns).

149. *Id.* (giving final reason for its holding).

150. *Id.* (explaining AWA promulgated regulations governing humane handling, care, treatment, and transportation of marine mammals.)

151. *Id.* at 1150 (reasoning captivity alone could be continually vexatious if not for serious harm qualifier).

152. *Id.* (explaining why AWA preempts ESA liability). The court suggests that had the AWA approved of a captive marine mammal's companions, for example, plaintiffs could bring suit alleging the chosen companions constitute "continual annoyance." *Id.* (overlooking Lolita's housing with incompatible PWSDs).

153. *People for the Ethical Treatment of Animals, Inc.*, 879 F.3d at 1150 (stating final definition).

154. *Id.* (holding PETA cited no injury to Lolita that satisfies this standard.)

ESA is erroneous for two primary reasons.¹⁵⁵ First, the court erred in adding the “threat of serious harm” standard to the definitions of “harm” and “harass” because it contradicts Supreme Court precedent.¹⁵⁶ Second, even if the court did not err in imposing the heightened standard, the conditions of Lolita’s captivity rise to meet the serious threat standard.¹⁵⁷ The court, therefore, erred in holding that Lolita is neither harmed nor harassed under the ESA.¹⁵⁸

A. Adding the Serious Threat Standard to Harm and Harass

Because relevant precedent and Congressional records indicate how “take” ought to be interpreted under the ESA, the Eleventh Circuit erred in applying *noscitur a sociis* to ascertain the word’s meaning.¹⁵⁹ Further, the court incorrectly held the AWA effectively precludes the ESA from protecting Lolita.¹⁶⁰ Finally, the Eleventh Circuit erred in not looking to other courts to see how they resolved this issue.¹⁶¹ Consequently, the Eleventh Circuit erred in adding the serious threat standard because there is no legal basis for the heightened standard.¹⁶²

Committee reports show Congress’s facial intent behind the ESA’s “taking” provision.¹⁶³ The Senate report emphasized that “take is defined in . . . the broadest possible manner to include *every conceivable way* in which a person can take . . . wildlife.”¹⁶⁴ Further,

155. For a discussion of the Eleventh Circuit’s errors, see *infra* notes 159-247 and accompanying text.

156. For a discussion of the Eleventh Circuit’s legal errors, see *infra* notes 159-92 and accompanying text.

157. For a discussion of the Eleventh Circuit’s factual errors, see *infra* notes 195-247 and accompanying text.

158. For a discussion as to why the Eleventh Circuit’s analysis was incorrect, see *infra* notes 159-247 and accompanying text.

159. See *Babbitt v. Sweet Home Chapter of Comtys. for a Great Or.*, 515 U.S. 687, 702 (1995) (holding *noscitur a sociis* not appropriate to define prohibited take).

160. See *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 115 (2014) (holding complementary statutes do not preclude one another).

161. For a discussion of how other circuits have approached this issue, see *supra* notes 98-114 and accompanying text.

162. See Shephard Legal, *supra* note 117 at 292 (noting no legal precedent for Eleventh Circuit’s ruling).

163. See *Sweet Home*, 515 U.S. at 704 (stating Congressional intent behind “taking”).

164. S. Rep. No. 93-307, at 7 (1973), as reprinted in 1973 U.S.S.C.A.N. 2989, 2996 (highlighting congressional intent for broad reading of ESA).

the House report said restrictions on takings are defined by “the broadest possible terms.”¹⁶⁵

The Supreme Court has similarly interpreted the ESA as a broad piece of legislation.¹⁶⁶ In the first ESA case ever presented before it, the Court described the ESA as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”¹⁶⁷ In *Sweet Home*, the Supreme Court reiterated the ESA’s broad purpose and explicitly rejected a narrow reading of “harm.”¹⁶⁸ Instead, the Court favored a broad definition of “harm,” permitting unintentional conduct to constitute an unlawful taking.¹⁶⁹ The majority strongly disavowed the use of *noscitur a sociis* entirely.¹⁷⁰ Justice Scalia’s dissent, however, utilized the canon to argue that “take” can be read narrowly.¹⁷¹

Instead of following precedent that directly addresses the interpretive issue in *Miami Seaquarium*, the Eleventh Circuit surprisingly followed the approach in Justice Scalia’s *Sweet Home* dissent without providing rationale for departing from the majority’s holding.¹⁷² Rather, the court suggested that a broad reading of the terms “harm” and “harass” would be “out of step with the ESA’s purpose.”¹⁷³ This statement is the closest the court came to explaining why it departed from the *Sweet Home* precedent.¹⁷⁴ The court nonetheless failed to address why a broad reading would be out of step with the ESA’s purpose.¹⁷⁵

Moreover, the Supreme Court ruled that when two statutes complement each other, one should not be read to preclude the other.¹⁷⁶ Although the Eleventh Circuit did not explicitly state that the AWA precludes actions under the ESA, it came very close, sug-

165. *Sweet Home*, 515 U.S. at 704 (noting House’s interpretation of “taking”).

166. *See id.* (refusing to interpret “taking” provision narrowly); *see also* *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) (holding ESA is very comprehensive).

167. *Tenn. Valley*, 437 U.S. at 180 (describing ESA as comprehensive).

168. *Sweet Home*, 515 U.S. at 700 (rejecting narrow reading of “harm”).

169. *Id.* at 705 (favoring broad interpretation).

170. *Id.* at 702 (disapproving application of *noscitur a sociis*).

171. *Id.* at 721 (Scalia, J., dissenting) (advocating application of *noscitur a sociis*).

172. *See* *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 879 F.3d 1142, 1147 (11th Cir. 2018) (failing to give valid reason for not following established precedent).

173. *Id.* at 1149 (giving flimsy rationale for departure from majority’s approach).

174. *See id.* (failing to provide additional rationale).

175. *See id.* (refraining from justifying narrow reading with ESA’s purposes).

176. *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 115 (2014) (holding complementary statutes do not preclude one another).

gesting PETA's definitions of harm and harass would "nullify the AWA in the context of captive endangered animals."¹⁷⁷ In *POM Wonderful*, both the Lanham Act and the FDCA "touch[ed] on food and beverage labeling," but because the Acts have different protections, requirements, and remedies, the Court held the statutes can, and should, be reconciled.¹⁷⁸ The Court asserted that holding otherwise would show "disregard for . . . congressional design."¹⁷⁹

Here, both the AWA and the ESA touch on the conditions of endangered animal captivity, but have different protections, requirements, and remedies.¹⁸⁰ The ESA has a citizen-suit provision that allows ordinary people to hold organizations accountable for their mistreatment of an animal.¹⁸¹ Whereas, the AWA does not have a citizen-suit provision and, instead relies on agencies to enforce regulations.¹⁸² Further, the NMFS decided to specifically list Lolita as an animal entitled to ESA protections, so precluding the ESA from operation does not show deference to the NFMS's decision.¹⁸³ Thus, under *POM Wonderful*, the Eleventh Circuit erred in interpreting the relationship between the ESA and the AWA while crafting its definitions of harm and harassment.¹⁸⁴

Finally, the Eleventh Circuit is the only court to add the serious threat standard to the ESA's taking provision to date.¹⁸⁵ In *Graham*, the Western District of Texas openly stated that it found the Southern District of Florida's reasoning for granting summary judgment

177. *People for the Ethical Treatment of Animals, Inc.*, 879 F.3d at 1150 (suggesting AWA may effectively preclude ESA from operation).

178. *POM Wonderful*, 573 U.S. at 115 (providing that statutes serve different functions so they should be reconciled).

179. *Id.* (explaining why statutes should not preclude one another).

180. For a discussion of the ESA and the AWA, see *supra* notes 66-187 and accompanying text.

181. Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (2002) (permitting citizen suits).

182. Animal Welfare Act of 1966, 7 U.S.C. § 2146 (1990) (detailing AWA enforcement). It is also important to note that enforcement of the AWA is woefully inadequate. *USDA Enforcement of Animal Welfare Act Hits a New Low*, ASPCA (Aug. 10, 2018), <https://www.aspc.org/news/usda-enforcement-animal-welfare-act-hits-new-low> (noting current enforcement scheme leaves much to be desired).

183. Listing Endangered or Threatened Species: Amendment to the Endangered Species Act Listing of the Southern Resident Killer Whale Distinct Population Segment, 80 Fed. Reg. at 7,380 (listing Lolita specifically as endangered species).

184. See *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 879 F.3d 1142, 1150 (11th Cir. 2018) (holding statutes do not permit PETA's definitions).

185. For a discussion of other courts' interpretations of the taking provision as it relates to endangered animals in captivity, see *supra* notes 98-114 and accompanying text.

“largely unpersuasive.”¹⁸⁶ The *Graham* court refused to apply the Southern District of Florida’s novel standard because there was “no support for this standard in the ESA, the AWA, or the relevant regulations.”¹⁸⁷ The Western District of Texas further held that compliance with the AWA is not dispositive of the issue of ESA liability.¹⁸⁸

The Fourth Circuit also declined to utilize *noscitur a sociis* in deciding *Hill*.¹⁸⁹ Instead of turning to maxims of statutory construction, the *Hill* court relied on Congress’s broad intent behind the ESA.¹⁹⁰ The Fourth Circuit further criticized the “protection-narrowing” interpretation of “harass” as a direct conflict with the ESA’s broad purposes.¹⁹¹ Although the Southern District of Florida handed down the preliminary *Miami Seaquarium* decision before the Fourth Circuit decided *Hill*, the court refused to engage with a comparable interpretation of the ESA’s taking provision.¹⁹²

Thus, the Eleventh Circuit’s decision to impose the serious threat standard was erroneous for three reasons: (1) it disregarded congressional records showing the ESA is meant to apply broadly, (2) it failed to consider relevant Supreme Court precedent, and (3) it overlooked the fact that, in light of the precedent and congressional records, other courts have refused to apply canons of statutory construction to resolve this issue.¹⁹³ Perhaps concern for Florida’s tourism industry, or animus toward litigious organizations like PETA, played some role in the Eleventh Circuit’s departure from settled principles.¹⁹⁴

186. *Graham v. San Antonio Zoological Soc’y*, 261 F. Supp. 3d 711, 741 (W.D. Tex. 2017) (remaining unpersuaded by *PETA* lower court’s holding).

187. *Id.* at 743 (stating why *PETA* court erred). The Western District of Texas further stated that the *PETA* court overlooked the clear definitions promulgated by relevant agencies. *Id.* (explaining error further).

188. *Id.* at 745 (finding AWA compliance does not preclude ESA liability).

189. *Hill v. Coggins*, 867 F.3d 499, 511 (4th Cir. 2017) (declining to adopt Southern District of Florida’s approach).

190. *Id.* at 510 (relying on congressional intent over maxims of statutory construction).

191. *See id.* (criticizing lower court for attempting to narrow ESA protections).

192. *See generally id.* (failing to discuss narrow interpretation).

193. For a discussion of the court’s legal errors, see *supra* notes 159-192 and accompanying text.

194. For a valuation of these animals, see *infra* note 251 and accompanying text.

B. Harmful and Harassing Conditions of Lolita's Confinement

It is well documented in the scientific community that killer whales are highly intelligent, social creatures.¹⁹⁵ In the wild, they live in “tight-knit family groups that share a sophisticated, unique culture that is passed down through generations.”¹⁹⁶ Different communities of whales even have different “languages,” and the calls are so distinct that researchers can identify them by ear alone.¹⁹⁷ When biologist Ken Balcomb played recorded calls of Lolita's familial pod, Lolita could recognize and respond to the calls.¹⁹⁸ Killer whales are also apex predators and very active swimmers.¹⁹⁹ In the wild, killer whales swim hundreds of miles per day and can dive as deep as five hundred feet in a single dive.²⁰⁰

Lolita's tank is essentially the size of a hotel swimming pool, measuring thirty-five feet wide, eighty feet across, and twenty feet deep.²⁰¹ Seaquarium's records indicate that they frequently drop water levels, sometimes leaving her with only eleven feet to dive.²⁰² When she is not performing, Lolita “floats listlessly” or swims in circles around the perimeter of her tank.²⁰³ These atypical, repetitive behaviors are signs of zoochosis.²⁰⁴ Zoochosis is a direct result of

195. *Facts About Orcas (Killer Whales)*, WHALE & DOLPHIN CONSERVATION, <https://us.whales.org/whales-dolphins/facts-about-orcas/> (last visited Oct. 2, 2020) (explaining killer whale intelligence and communication).

196. *Orca*, NAT'L GEOGRAPHIC, <https://www.nationalgeographic.com/animals/mammals/o/orca/#close> (last visited Sept. 25, 2020) (explaining killer whale culture).

197. *What Are Killer Whales Saying?*, NAT'L GEOGRAPHIC (Nov. 3, 2013), <https://blog.nationalgeographic.org/2013/11/03/what-are-killer-whales-saying/> (detailing killer whale languages and calls).

198. Colvin, *supra* note 18 (suggesting Lolita remembers her family).

199. *Facts About Orcas (Killer Whales)*, *supra* note 195 (noting wild killer whale behavior). An apex predator is “at the top of a food chain [and] not preyed upon by any other animal.” *Apex Predator*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/apex%20predator> (last visited Dec. 22, 2020) (defining apex predator). Examples of apex predators include bears, wolves, sharks, and lions. Stier ET AL., *Ecosystem Context and Historical Contingency in Apex Predator Recoveries*, SCI. ADVANCES, May 27, 2016, at 1 (listing examples of other apex predators).

200. *Her Story*, *supra* note 33 (detailing extent of wild killer whale mobility).

201. *Id.* (highlighting Lolita's tank is much too small to engage in normal behavioral patterns).

202. *12 Things Lolita Would Want Miami Seaquarium Visitors to Know*, *supra* note 37 (detailing how tank water levels often drop).

203. *Id.* (explaining Lolita's behavioral patterns compared to wild killer whales).

204. *Id.* (stating Lolita displays signs of depression).

the stress and depression captive animals feel as a result of “frustration of natural behaviour patterns.”²⁰⁵

The definitions of harm and harass proffered by the relevant agencies and accepted by the Eleventh Circuit show Miami Seaquarium has “taken” Lolita in violation of the ESA.²⁰⁶ Both definitions suggest that an animal is harmed and harassed when its typical behavioral patterns are significantly interrupted.²⁰⁷ The size of Lolita’s tank makes it impossible for her to swim like her wild counterparts.²⁰⁸ Using the circumference of her tank, Lolita would need to swim over 2,400 laps per day to equal the minimum distance killer whales swim in the wild.²⁰⁹ This calculation assumes the most generous measurements of Lolita’s tank.²¹⁰ There is a concrete work island preventing Lolita from reaching the medical pool at the back of her tank, so she cannot complete a full lap without impediments.²¹¹ Because she can only swim a miniscule fraction of the distance her wild counterparts swim, her normal behavioral patterns are significantly impaired.²¹²

205. *Stereotypic Behaviour in Captive Wild Animals: Zoochosis*, BORN FREE, <https://www.bornfree.org.uk/zoochosis> (last updated 2020) (defining zoochosis). Examples of other zoochotic behaviors include rocking, head bobbing, pacing, and self-mutilation. *Id.* (giving examples of zoochosis behaviors).

206. See 50 C.F.R. § 222.102 (2015) (defining harm); 50 C.F.R. § 17.3 (defining harass).

207. See 50 C.F.R. § 222.102 (noting harm includes disrupted behavioral patterns); 50 C.F.R. § 17.3 (using impaired behavioral patterns as examples of harm and harassment).

208. See *Her Tank*, *supra* note 32 (detailing dimensions of her tank).

209. See *id.* (giving tank measurements). To calculate the circumference of her tank, the equation is $C=2(\pi)(r)$. *Calculating the Circumference of a Circle*, MATH PLANET, <https://www.mathplanet.com/education/pre-algebra/more-about-equation-and-inequalities/calculating-the-circumference-of-a-circle> (last visited Oct. 10, 2020) (giving calculation to find circumference). Here, r is thirty-five feet, so the circumference is about 219 feet. See *Her Tank*, *supra* note 32 (giving radius of tank). One-mile equals 5,280 feet. *How Many Feet are in a Mile*, RAPID TABLES, <https://www.rapidtables.com/convert/length/how-many-feet-in-mile.html> (last visited Oct. 12, 2020) (giving how many feet per mile). The number of feet per mile divided by the circumference of the tank shows Lolita must swim twenty-four laps to reach one mile. *Scientific Calculator*, DESMOS, <https://www.desmos.com/scientific> (last visited Oct. 12, 2020) (calculating number of laps to equal one mile). If killer whales swim 100 miles per day at minimum, Lolita would need to swim over 2,400 laps to hit 100 miles. See *id.* (multiplying number of laps to equal one mile by 100 to ascertain how many laps are needed to swim 100 miles).

210. See *Her Tank*, *supra* note 32 (highlighting inadequate size by even most generous measurements).

211. *Id.* (noting large obstruction in her tank).

212. Natasha Daly, *Orcas Don’t do Well in Captivity. Here’s Why.*, NAT’L. GEOGRAPHIC (Mar. 25, 2019), <https://www.nationalgeographic.com/animals/2019/03/orcas-captivity-welfare/> (noting killer whales’ genetic disposition to migrate oceans).

Further, conditions of her captivity violate numerous AWA regulations.²¹³ As the Fourth Circuit held in *Hill*, violations of the AWA's animal husbandry provisions is direct evidence of harm and harassment under the ESA.²¹⁴ If a "take" has occurred, the court may force the captor to forfeit the captive animals, which will then be rehomed.²¹⁵ Here, the Eleventh Circuit should have followed the *Hill* court's reasoning and rehomed Lolita to a seaside pen because Seaquarium's treatment of her violated the AWA's marine mammal exhibition regulations for several reasons.²¹⁶

First, the AWA requires aquariums to surround marine mammal tanks with six-foot high fences that "keep unauthorized persons [and objects] out."²¹⁷ Lolita's tank is surrounded by a glass partition low enough for visitors to rest their elbows.²¹⁸ If park guests are easily able to reach over the partition surrounding Lolita's tank, it cannot offer her adequate protection from the public.²¹⁹ Thus, the physical barrier between Lolita and the viewing public violates AWA regulations.²²⁰

Second, AWA regulations require a shelter to protect marine mammals from direct sunlight because UV rays are harmful to their eyes and delicate skin.²²¹ Lolita does not have any shelter offering her shade, leaving her constantly exposed to the blistering Florida sun.²²² This exposure regularly results in sunburned, causing her

213. For a discussion of relevant AWA regulations and the factual circumstances of Lolita's confinement, see *infra* notes 214-44 and accompanying text.

214. *Hill v. Coggins*, 867 F.3d 499, 510 (4th Cir. 2017) (holding noncompliance with AWA regulations is direct evidence of ESA "taking").

215. *Kuehl v. Sellner*, 887 F.3d 845, 856 (8th Cir. 2018) (ordering harmed lemurs be transferred to better facility).

216. See *Hill*, 867 F.3d at 511 (holding AWA noncompliance can establish ESA "taking").

217. Facilities, Outdoor, 9 C.F.R. § 3.103(3)(c) (2000) (requiring perimeter fence of at least six feet to protect Lolita).

218. *How to Fight for Lolita's Retirement*, ORCA NETWORK, http://www.orcanetwork.org/Main/index.php?categories_file=APHIS+Letters (last visited Oct. 6, 2020) (providing dimensions of perimeter fence).

219. See 9 C.F.R. § 3.103(3)(c) (2000) (noting perimeter fence's purpose of protecting marine mammals).

220. Compare *id.* (requiring six-foot barrier), with *Lolita the Orca; Facts, Legal Issues, and How to Get Her Home*, THE ORCA PROJECT (Sept. 1, 2010), <https://theorcaproject.files.wordpress.com/2010/08/msq2-perimeter-fence.jpg?w=300&h=225&z=2> (showing picture of park guests resting elbows on Lolita's tank).

221. 9 C.F.R. § 3.103(b) (requiring protection of marine mammals from sun's rays).

222. *Lolita: August 2020 Marked 50 Years of Captivity for Another Tortured Orca*, SOC'Y FOR THE PROT. OF ANIMALS CAN. (Aug. 8, 2020), <http://www.spacanada.org/2020/08/11/lolita-august-2020-marked-50-years-of-captivity-for-another-tortured-orca/> (noting Lolita's sunburns).

skin to blister and wrinkle.²²³ In an attempt to conceal her injuries from the public, Seaquarium employees paint her with black zinc oxide before performances.²²⁴ Additionally, Seaquarium's records show Lolita has a condition caused by direct sunlight known as "surfer's eye."²²⁵ In the wild, Lolita could dive deep beneath the surface of the ocean to protect her eyes from the sun's rays, but this is not an option in captivity.²²⁶ Thus, Seaquarium has not done enough to protect Lolita from the scorching sun under AWA regulations.²²⁷

Moreover, marine mammals must be "housed in their primary enclosure with at least one compatible animal."²²⁸ At Seaquarium, Lolita is housed with PWSDs that regularly rake her with their teeth, leaving her with open wounds that require antibiotics.²²⁹ On at least one occasion, a PWSD "engaged in sexual behavior with Lolita" as a display of dominance.²³⁰ Marine scientist Ingrid Visser described this behavior as "completely inappropriate."²³¹ Because the PWSDs regularly display physical and sexual aggression toward Lolita, they are an incompatible species that should not be housed with her under AWA regulations.²³²

223. *12 Things Lolita Would Want Miami Seaquarium Visitors to Know*, supra note 37 (acknowledging Lolita's tendency to burn).

224. *Lolita: August 2020 Marked 50 Years of Captivity for Another Tortured Orca*, supra note 222 (observing Seaquarium's policy of hiding Lolita's injuries). Zinc oxide works like a sunscreen to protect the fragile skin of marine mammals. Ashley Magovern, MD, *Everything You Want to Know About Zinc Oxide*, PROJECT SUNSCREEN, projectsunscreen.com/blogs/ingredients/everything-you-want-to-know-about-zinc-oxide (last visited Dec. 20, 2020) (detailing benefits of zinc oxide). It is, however, normally a pearly white substance, so Seaquarium's black zinc oxide serves the additional purpose of concealing injuries. *See id.* (describing how zinc oxide leaves white hue on dark skin).

225. *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 879 F.3d 1142, 1150 n. 4 (11th Cir. 2018) (stating Lolita has surfer's eye). Surfer's eye is a condition caused by UV rays that causes a growth on the white portion of the eye and can infect the cornea. Amy Hellem, *Pterygium: What is "Surfer's Eye"?*, ALL ABOUT VISION, <https://www.allaboutvision.com/conditions/pterygium.htm> (last updated Aug. 2017) (defining surfer's eye).

226. *12 Things Lolita Would Want Miami Seaquarium Visitors to Know*, supra note 37 (noting twenty feet is not deep enough to escape UV rays).

227. *Id.* (acknowledging Lolita is not adequately protected).

228. Separation, 9 C.F.R. § 3.109 (2000) (requiring marine mammals be housed with compatible species).

229. Colvin, supra note 18 (outlining PWSDs' violence towards Lolita).

230. *See Hal Bernton, Documents Show Unsettling Look at Orca Lolita's Life in Seaquarium*, THE SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/environment/orca-unsealed/> (last updated Aug. 24, 2016) (describing PWSDs' sexual aggression).

231. *Id.* (noting expert opinion).

232. *Id.* (observing hostile animal relationships).

Finally, AWA regulations mandate a contingency plan for the evacuation of animals in the event of a disaster.²³³ Seaquarium did not have any evacuation plans in place for its animals when Hurricane Irma struck South Florida in 2017 and displaced 5.6 million people.²³⁴ Instead, Seaquarium abandoned Lolita to ride out the storm alone with no procedures in place, or staff on site, to protect her.²³⁵ Foresaken, Lolita could have been killed in a number of ways.²³⁶ She could have (1) gotten electrocuted from her tank short-circuiting, (2) drowned from debris blocking the surface of her tank, or (3) been impaled by collapsing elements of the Seaquarium stadium.²³⁷ Gambling with the life of a beautiful, intelligent, and endangered animal is not only immoral, but it is also a direct violation of the ESA.²³⁸

Cumulatively, these violations of AWA regulations amount to an impermissible “take” under the ESA, even with the Eleventh Circuit’s serious threat standard.²³⁹ Abandoning a helpless Lolita during a Category Five hurricane seriously threatened her continued existence.²⁴⁰ Forcing Lolita into a tank so small — she would need to swim 2,400 laps a day to reach the minimum distance killer whales swim in the wild — harasses her beyond the Eleventh Circuit’s serious threat standard because captivity produces behavioral pattern changes that result in self-harm.²⁴¹ On March 4, 1980, after twelve years of “repeated brutal, self-inflicted damage to his head,” Lolita’s only killer whale companion, Hugo, intentionally rammed his head against the side of his tank.²⁴² Hugo immediately suffered

233. 9 C.F.R. 3.101(4)(b) (2000) (requiring facilities housing marine mammals have evacuation contingency plans).

234. See Michael Sainato & Chelsea Skojec, *Miami Seaquarium Leaves Marine Animals in Place During Hurricane Irma*, OBSERVER (Sept. 11, 2017), <https://observer.com/2017/09/miami-seaquarium-abandons-marine-animals-before-hurricane-irma/> (reporting Seaquarium’s lack of contingency plans).

235. *Id.* (explaining how Seaquarium abandoned Lolita). “In contrast, dolphins at an aquarium in Cuba were airlifted to safety . . . before [Hurricane Irma] made landfall.” *Id.* (observing how other aquariums handled storm).

236. *Id.* (noting Lolita’s grave danger).

237. *Id.* (detailing ways Lolita may have perished).

238. See *Hill v. Coggins*, 867 F.3d 499, 511 (4th Cir. 2017) (holding AWA violations may establish ESA violation).

239. For a discussion of Seaquarium’s numerous AWA violations, see *supra* notes 214-38 and accompanying text.

240. See Sainato & Skojec, *supra* note 234 (suggesting Seaquarium was lucky Lolita survived).

241. See Cara Sands, *One Dolphin’s Story — Hugo*, DOLPHIN PROJECT, <https://www.dolphinproject.com/blog/one-dolphins-story-hugo/> (last visited Oct. 10, 2020) (telling story of Lolita’s former tank companion, Hugo).

242. *Id.* (detailing Hugo’s self-caused injury).

a brain aneurysm and died as a direct result of his inability to adjust to life in captivity.²⁴³ Due to the current conditions of her captivity, Lolita may suffer the same fate.²⁴⁴

Seaquarium's behavior toward Lolita and its other animals shows a total disregard for the animals' safety and wellbeing.²⁴⁵ The conditions of Lolita's captivity rise to meet the serious threat standard due to the size of her tank, the numerous AWA violations, and the total lack of remorse shown when comparable actions caused the death of another killer whale.²⁴⁶ Thus, the Eleventh Circuit erred in dismissing these factual allegations against Seaquarium and relegating all factual inquiry to one footnote in its opinion.²⁴⁷

VI. THE SHOW MUST GO ON: IMPACT OF THE *MIAMI SEAQUARIUM* DECISION

The Eleventh Circuit's ruling in *Miami Seaquarium* drastically limits the public's ability to hold organizations accountable for the abuse they inflict on captive animals.²⁴⁸ Though the court meant to exclude only *de minimis* harm and harassment from being actionable, the harm and harassment to Lolita rises far beyond that standard.²⁴⁹ If this court believes the harm to Lolita is *de minimis*, it is hard to imagine a circumstance in which harm could ever rise above that standard.²⁵⁰

Moreover, the exhibition of whales and dolphins is a booming industry; in 2004, a single dolphin could bring in one million dol-

243. *Id.* (noting Hugo could not transition to captivity).

244. *Id.* (describing Hugo's short, painful life). Hugo's body was quietly dumped into the Miami Dade landfill after his death. *Id.* (describing disposal of Hugo's remains).

245. For a discussion of Seaquarium's many failures, see *supra* notes 17-61 and accompanying text.

246. See Sands, *supra* note 241 (discussing Seaquarium's failure to care for their animals).

247. See *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 879 F.3d 1142, 1145 n.4 (11th Cir. 2018) (listing PETA's cited injuries to Lolita).

248. See *id.* (holding harm must rise above *de minimis* to be actionable).

249. For a discussion of the serious harm Lolita faces, see *supra* notes 17-61 and accompanying text. *De minimis* means "a thing so insignificant that a court may overlook it in deciding an issue or case." *De Minimis Definition*, BLACK'S LAW DICTIONARY (11th ed. 2019), available at Westlaw (defining *de minimis*).

250. See *People for the Ethical Treatment of Animals, Inc.*, 879 F.3d at 1145 n.4 (challenging implication thirteen injuries not enough to establish more than *de minimis* harm).

lars a year.²⁵¹ Killer whales are worth incredible amounts of money to exhibitors even in death, “bringing their owners million-dollar life insurance payouts.”²⁵² With the new serious threat standard, many exhibitors could be tempted to cut corners to escape liability easily while still collecting life insurance payouts, should an animal death occur.²⁵³

Further, this decision could lead to continued violence between captive killer whales and their human trainers.²⁵⁴ Wild killer whales have never killed a human being, and there is only one confirmed case of an attack on a human in the wild.²⁵⁵ Captive killer whales, on the other hand, have attacked at least 153 people.²⁵⁶ Lolita herself attacked three people between 1970 and 2012.²⁵⁷ Moreover, captive killer whales have killed four people, including a senior SeaWorld Trainer known for her adherence to safety rules, Dawn Brancheau.²⁵⁸ Ms. Brancheau was killed when a captive whale named Tilikum grabbed her by the ponytail and pulled her into his tank.²⁵⁹ According to the medical examiner, Ms. Brancheau died due to multiple traumatic injuries and drowning.²⁶⁰ In 2016, six years after Ms. Brancheau’s death, SeaWorld

251. Sally Kestin, *Captive Mammals Can Net Big Profits for Exhibitors*, S. FLA. SUN SENTINEL (Dec. 14, 2004), <https://www.sun-sentinel.com/sfl-dolphins-moneydec31-story.html> (detailing profits of marine mammal exhibitors).

252. *Id.* (highlighting how much exhibitor can profit from dead killer whales).

253. *See People for the Ethical Treatment of Animals, Inc.*, 879 F.3d at 1150 (noting increased difficulty in proving exhibitors’ liability).

254. *Aggressive Incidents Between Humans and Killer Whales in Captivity*, INHERENTLY WILD, <https://inherentlywild.co.uk/aggressive-incidents/> (last updated Sept. 2015) (listing all incidents between people and captive killer whales between 1967 and 2015).

255. *Killer Whale Attacks*, WHALE FACTS, <https://www.whalefacts.org/killer-whale-attacks/> (last visited Oct. 10, 2020) (detailing how infrequently wild killer whales attack people).

256. *Aggressive Incidents Between Humans and Killer Whales*, *supra* note 254 (listing all 153 through September 2015). It is highly likely that there are more incidents than recorded, as the chart stops in September 2015. *Id.* (noting lack of data after September 2015).

257. *Id.* (highlighting Lolita’s attacks).

258. Elizabeth Batt, *Seven Years On: Revisiting the Death of Dawn Brancheau*, DOLPHIN PROJECT (Feb. 2017), <https://www.dolphinproject.com/blog/five-years-on-revisiting-the-death-of-dawn-brancheau/> (explaining Ms. Brancheau’s death).

259. *Workers Tell of Desperate Attempt to Save Trainer Attacked by Killer Whale*, GUARDIAN (Mar. 2, 2010), <https://www.theguardian.com/world/2010/mar/02/trainer-killer-whale-seaworld> (detailing the attack).

260. *Id.* (giving official cause of death).

stated that it would stop displaying and breeding captive killer whales.²⁶¹

Seaquarium has not stated similar intentions and will continue to display Lolita unless ordered to stop.²⁶² In fact, during a multi-million dollar renovation in 2018, Seaquarium modernized their entrance, expanded giftshops, and added a brand new exhibit.²⁶³ This renovation, however, did not expand the size or depth of Lolita's tank.²⁶⁴ The only addition to her tank was a jumbotron to help the audience see her.²⁶⁵ Despite the massive controversy surrounding killer whale captivity, Seaquarium flatly refuses to give Lolita an adequate living space even though it has the budget to do so.²⁶⁶ Lolita, a highly intelligent, social creature, is nothing more than a "vehicle by which [Seaquarium] promote[s] their name [and] their political agenda to obtain money and to gain media attention."²⁶⁷

The impact of this case is undoubtedly sad; a majestic, intelligent creature — still capable of recognizing the calls of her family fifty years later — is forced to continue her life of solitary confinement for profit and human entertainment.²⁶⁸ Beyond the immediate impact on Lolita, this holding will provide further support for the defense of exhibitors holding their animals in subpar conditions.²⁶⁹ Animal activists, however, do not plan on abandoning

261. Greg Allen, *SeaWorld Agrees to End Captive Breeding of Killer Whales*, NPR (Mar. 17, 2016), <https://www.npr.org/sections/thetwo-way/2016/03/17/470720804/seaworld-agrees-to-end-captive-breeding-of-killer-whales> (stating SeaWorld's plan).

262. Jonathan Kendall, *PETA Seeks Animal-Cruelty Charges Against Miami Seaquarium*, MIAMI NEW TIMES (Aug. 3, 2020), <https://www.miaminewtimes.com/news/lolita-2020-peta-seeks-cruelty-charges-against-miami-seaquarium-11645755> (stating PETA seeks criminal charges as Lolita's abuse continues).

263. Todd Tongen, *Miami Seaquarium Unwavering in Stance Regarding Lolita the Killer Whale*, LOC. 10 NEWS (May 24, 2018), <https://www.local10.com/news/2018/05/24/miami-seaquarium-unwavering-in-stance-regarding-lolita-the-killer-whale/> (describing Seaquarium's renovation).

264. *Id.* (stating that Lolita's tank received no renovation).

265. *Id.* (noting addition of jumbotron was only change to Lolita's tank, added for audience benefit).

266. *See id.* (inferring Seaquarium has budget to renovate Lolita's tank but chose not to).

267. *Id.* (stating how animal activists view Seaquarium's treatment of Lolita).

268. Lynda Mapes, *Puget Sound Orca Lolita to Remain Captive at Miami Seaquarium, Court Rules*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/environment/orca-lolita-to-remain-captive-at-miami-seaquarium-court-rules/> (last updated May 13, 2019) (stating outcome of case).

269. *See People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 879 F.3d 1142, 1150 (11th Cir. 2018) (holding harm must be "serious" without explaining what "serious" harm entails).

Lolita like Seaquarium did during Hurricane Irma.²⁷⁰ Activists continue to fight for her retirement to a seapen off the Puget Sound where she could be reunited with her familial pod.²⁷¹ With hope — and an equitable ruling from the court — Lolita may one day be able to return to her home waters to live out the rest of her life with her family.²⁷²

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270. Kendall, *supra* note 262 (explaining how PETA is continuing to fight Seaquarium).

271. *Id.* (highlighting activists' requests for Lolita).

272. Mapes, *supra* note 268 (stating ideal outcome for Lolita).

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